UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/593
28 June 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 593

Case No. 639: QADER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen, Vice President; Mr. Mikuin Leliel Balanda;

Whereas, on 10 December 1991, Abdul Qader, a staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application requesting the Tribunal to order:

"...

2- Relief for the mistake on my promotion effective 11 January 1983:

(a) Rectification of the mistake (two additional steps) as of the date the mistake has been committed, i.e. 1 January 1983;

(b) Payment of the difference in monetary terms as applicable to date, plus payment of interest at the rate of the major credit cards from the effective date of the entitlement to the present as applicable.

..."

Whereas the Respondent filed his answer on 4 December 1992;

Whereas the Applicant filed written observations on 29 January 1993;

Whereas, on 5 May 1993, the Applicant submitted an additional statement and documents and on 10 May 1993, the Respondent provided his comments thereon;

Whereas, on 21 May 1993, the Applicant commented on the Respondent's submission;

Whereas the facts in the case are as follows:

The Applicant, a national of Afghanistan, was locally recruited by UNDP in Afghanistan on 8 December 1973, where he served until 31 March 1978. From 22 May 1978 until 16 June 1978, he was employed by UNDP in New York, under a Special Service Agreement.

On 19 June 1978, the Applicant was recruited on a two-year fixed-term appointment at the Field Service (FS) 4, step VII level, as an Administrative Assistant, under the 100 Series of the Staff Rules. He served on further fixed-term appointments and was assigned to various field duty stations.

On 1 January 1982, the Applicant's appointment was converted from the FS-4, step X level, in the FS category, to the P-1, step X level in the Professional category. The Applicant thereby became entitled to a Personal Transitional Allowance (PTA) in the amount of $1,464.61, which was intended to compensate for any loss in take-home pay resulting from the conversion. The Personnel Action Form dated 1 April 1982, states that the PTA would be "payable until such time as it is overtaken by adjustment of staff member's salary at the Professional level".

In a letter dated 4 May 1982, the Applicant raised with the Chief, Staff Development and Placement Section at Headquarters, the question of his conversion to the P-1 level, which, in his opinion, could not "be considered a real promotion unless it was to a higher grade." In a reply dated 17 May 1982, the Chief, Staff Development and Placement Section at Headquarters noted "that the P-1 level is the correct level for conversions from FSL-4 and there is no recourse for conversion to a higher level", since a "conversion" was "strictly a conversion from one category to another based upon actual remuneration."

On 1 January 1983, the Applicant was promoted to the P-2, step III level and his appointment became permanent. The Applicant

claims in this respect that: "Upon the receipt of the respective Personnel Action Form (...) reflecting my promotion, I discovered that the amount of PTA, an integral part of my salary, had not been included in the computation of my salary on promotion. As a result, the salary was understated, and as such, the promotion was made to P-2, step III, instead of P-2, step V." In a letter dated 6 April 1983, addressed to the Personnel Section, the Applicant sought a clarification concerning the PTA. He stated in this regard:

> "... If this allowance is considered an integral part of my base pay, then it should be included in my 'Present Salary' figure when computing my salary on promotion. In which case, I should have been promoted to P.2, step V and date of next increment should read 1 February 1983 to step VI. If this allowance, however, has no bearing on promotion and it has to be overtaken through within-grade increment, then I want to know if I am still going to receive the applicable amounts on a monthly basis."

In a reply dated 26 May 1983, a Personnel Officer informed the Applicant that the Administration had amended his promotion Personnel Action Form "to include a Personal Transitional Allowance in the amount of $1035.95 net per annum until such time as it is overtaken by adjustment of your salary at the Professional level." The Applicant thus continued to receive a PTA, in an amount of $1,035.95 until October 1983, when it was overtaken by an adjustment of his salary.

On 1 January 1988, the Applicant was promoted to the P-3, step II level, as a Purchasing Officer and, on 1 January 1992, to the P-4, step III level.

In a letter dated 19 February 1990, the Applicant requested the Secretary-General to review the decision to grant him step III, instead of step V, on his promotion to the P-2 level in 1983. Not having received a reply, on 12 October 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted

its report on 1 August 1991. Its considerations and recommendations read, in part, as follows:

"...

29. The appellant contends and the Respondent does not refute that the appellant lost two within-grade increases since his promotion to P-2, because the Personal Transitional Allowance (PTA) he received at the time of his change in status from Field Service to the Professional category was not included in his salary. (...). The Panel considered the circumstances of the appellant's change in status from FS-4/X to P-1, step 10. On the basis of the documentation available to the Panel, it found that the situation was fraught with inconsistencies. The terms 'promotion' and 'conversion' are used interchangeably by the Administration Officials of UNDP. ...

30. Although conversions and promotions are governed by different sets of rules, in both cases the pensionable remuneration of the staff member must be greater than before. It is presumably for this reason that [the Applicant] was given a Personal Transition Allowance (PTA). This additional payment, the PTA, must per force be of the same nature as the payment to which it is added. Otherwise, his pensionable remuneration would drop after the conversion/promotion, which is an unacceptable situation: a pensionable remuneration should not decrease as a result of conversion/promotion.

31. The appellant, in his letter of 6 April 1983, upon his promotion to P-2, requested an answer to the question whether the PTA was an integral part of his salary or not, but according to the files available to the Panel, he never received an answer. Nor had the Ombudsman who, in his letter of 23 June 1988 to the appellant stated: 'I will try to meet with the Division of Personnel to resolve the issue (namely whether the PTA is part of base salary) and will advise you of the outcome'.

32. The Panel considered that the situation would have been administratively more clearcut had [the Applicant] been promoted to P-2 at the time he was changed over from Field Service. The Panel realized that it is neither for the Panel nor for the appellant to determine this question, as promotion is within the prerogatives of the Secretary-General. The Panel notes however a communication from the Resident Representative, a.i. in Nigeria dated 12 May 1981, a year before UNDP changed

the appellant over to the Professional category, in which he states that the appellant performed the duties of a departing staff member at the P-4 level and recommended him strongly for promotion to P-2.

33. The Panel found unanimously that the fact that the appellant when promoted to P-2 was given step two instead of step five as should have been done, had the PTA been treated as an integral part of his salary, slowed down his career as it affected and caused him to suffer moral damage and financial loss for which he should be compensated.

V. RECOMMENDATIONS

34. The Panel unanimously recommends that:

...

(ii) the within-grade step be rectified by the addition of two steps to his present grade, effective immediately."

On 16 September 1991, the Director, Department of Administration and Management, transmitted to the Applicant a copy of the JAB's report and informed him of the decision by the Secretary-General, taken in the light of the Board's report, as follows:

"... With regard to the Board's recommendation in paragraph 34(b) of the report, it should be noted that, upon your promotion to P-2, you continued to be paid a Personal Transitional Allowance so that you received a salary higher than that corresponding to the step at the P-2 level which you were granted. It should also be noted that the methodology applied was in accordance with established practice. While the Secretary-General does not agree with the Board's position, in view of the policy of accepting unanimous recommendations of the Joint Appeals Board, he has decided to exceptionally grant you two additional steps at your present grade effective 1 September 1991."

On 10 December 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. When the Applicant was promoted to P-2, step III, on the conversion of his status from the FS category to the Professional category, the Respondent erroneously did not include, as an integral part of his salary, the PTA the Applicant had been receiving at the time. This error in calculation resulted in a loss of two steps.

2. In accordance with the JAB recommendation that "the within grade step be rectified by the addition of two steps to his present grade, effective immediately", the Respondent should grant the two additional steps retroactively, as of the date of promotion from the P-1 to the P-2 level i.e., with effect from January 1983.

Whereas the Respondent's principal contentions are:

1. Staff rule 103.9 on "Salary policy in promotions" was correctly applied in determining the salary step to which the Applicant was assigned upon promotion.

2. Recommendations of the JAB may be appraised by the Respondent, whose decision in this case was a reasonable exercise of discretion.

The Tribunal, having deliberated from 11 June to 28 June 1993, now pronounces the following judgement:

I. The JAB made an unanimous recommendation that the Applicant's within-grade step be rectified by the addition of two steps to his present grade, effective immediately.

The Applicant claims that it means that the relief suggested by the Joint Appeals Board (JAB) has to be made retroactive from 1 January 1983, when he was promoted; in his view, no other interpretation is valid if he is to be compensated for all the hardships he claims he suffered. The Respondent decided that while he did "not agree with the Board's position, in view of the policy of accepting unanimous recommendations of the Joint Appeals Board,

he has decided to exceptionally grant you two additional steps at your present grade effective 1 September 1991".

II. The Tribunal notes that until 1984, the main concern of the Applicant was whether the Personal Transitional Allowance (PTA) granted to him on conversion/promotion would be continued and, if so, for how long and in what amount. There is evidence showing that during this period, the Applicant clearly understood how the PTA operated. In a letter of 26 May 1983, a Personnel Officer told the Applicant that his P-5 Personnel Action Form had been amended to include a PTA in the amount of $1,035.95 per annum (reduced from an earlier amount of $1,464.61 through absorption by increment in his current grade) "until such time as it is overtaken by adjustment of his salary in the Professional level". Thus, the Tribunal finds that prior to 1984, the Applicant should have known that the PTA was not considered an integral part of his salary and that he was not receiving a two-step increase in his grade level.

III. On 15 May 1984, about a year later, the Applicant wrote to the Chief, Division of South Africa of the UNDP Regional Bureau, stating that his PTA had been stopped since November 1983. This would imply that, as late as 15 May 1984, his contention was that he was entitled to receive a PTA but was not receiving it, for, in his view, it had not been overtaken by adjustment of his salary at the Professional level. There was apparently no reply to the Applicant's letter of 15 May 1984; there should have been some response, even as a matter of courtesy.

IV. It was not until 1987, when he sought the assistance of the UNDP Ombudsman, that the Applicant clearly raised the issue of his being improperly denied two steps in his 1983 promotion. He received no substantive reply to his representations. He continued to press his claim, first with the Respondent and later before the JAB for what he considered to be the proper level to which he thought he should have been promoted on 1 January 1983.

V. The JAB discussed all the aspects of the case. The Applicant quotes, with approval, the JAB's analysis and recommendations which the Respondent accepted, seemingly with some hesitation and exceptionally. The Respondent views the JAB's recommendation that the Applicant's within-grade step be rectified by addition of two steps to his present grade, effective immediately, as being "unambiguous": "the clear meaning of the word 'present' is 'current' and cannot mean what the Applicant contends".

VI. The Tribunal has considered carefully the wording of the JAB's recommendation and the reasons leading to it. It takes the view that the JAB meant that the 2-step advancement should be made on the present grade of the Applicant and should be given immediate effect. The Applicant's interpretation - that the JAB intended retroactive effect from 1983 - is unsupported. The Tribunal considers, therefore, that the JAB was of the view that its recommendation, if accepted, would provide adequate compensation for any losses the Applicant might have suffered. The Tribunal finds no ground for disagreeing with the JAB on this point. The Respondent's interpretation of the JAB's recommendation was correct and his willingness to adopt it constituted fair treatment of the Applicant.

VII. The Tribunal, finally, takes the view that much delay and difficulty in this case could have been avoided if a clear, detailed and timely statement on "methodology applied in accordance with the established practice" could have been made in response to the many communications from the Applicant. Such a statement would have eliminated much of the inference, deduction and speculation which characterize this case.

VIII. In view of the foregoing, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 28 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
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AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/594
28 June 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 594

Case No. 649: DEL ROSARIO-SANTOS Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen, Vice-President; Mr. Ioan Voicu;

Whereas at the request of Veronica del Rosario-Santos, a staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, successively extended to 27 December 1991 and 31 January 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 January 1992, the Applicant filed an application requesting the Tribunal:

"...

5. (1) To declare the present appeal receivable.

(2) To find that the Joint Appeals Board erred by introducing extraneous factors into its consideration of the Applicant's appeal.

(3) To adjudge that UNICEF, in selecting the candidate to fill the post of Assistant to the Associate Director did not adhere to UNICEF Administrative Instruction No. 352, that UNICEF misapplied the guidelines and that UNICEF failed to comply with staff regulation 4.4.

(4) To declare that UNICEF circumvented a fair review of qualified candidates by the Appointment and Placement Committee.

(5) To adjudge and declare that the Applicant was denied due process due to procedural irregularity in the selection process.

(6) To find that there was prejudice against the Applicant caused by procedural mistake.

(7) To find that the Applicant was treated in an arbitrary manner which precluded her selection as the successful candidate for the post.

(8) To order the Respondent to pay the Applicant damages in the amount of two years of net salary, for violation of the terms of her permanent appointment, for lack of due process and for prejudice against the Applicant.

(9) To order the Respondent to assign the Applicant a post and grade equivalent to the post of Assistant to the Associate Director of the Programme Division of UNICEF."

Whereas the Respondent filed his answer on 20 October 1992;

Whereas the Applicant filed written observations on 15 January 1993;

Whereas, on 27 January 1993, the Respondent submitted an additional statement;

Whereas, on 10 May 1993, the Applicant submitted an additional document and amended her pleas as follows:

"(9) to order the Respondent to pay the Applicant damages in the amount of two years of net salary, for exemplary moral damages, including punitive damages."

Whereas, on 19 May 1993, the Respondent commented on the Applicant's amended pleas;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 11 May 1972, as a Stenographer. She was initially offered a fixed-term appointment at the G-2 level, until 11 August 1972, when she was granted a probationary appointment. On 1 May 1974, the Applicant's appointment was converted to a regular appointment. During the

course of her employment with UNICEF, the Applicant received successive promotions, reaching the G-6 level from 1 January 1985, with the functional title of Programme Assistant.

On 4 September 1990, the Division of Personnel issued a Vacancy Announcement for the P-2 level post of Assistant to the Associate Director. The Applicant and seventeen other candidates, internal and external, applied for the position.

On 23 October 1990, the Director of the Programme Division, transmitted to the Division of Personnel his assessment of the qualifications of the candidates, short-listing four candidates. The Applicant ranked third in the short-list.

According to the record, a Selection Advisory Panel (SAP), consisting of a representative of the Appointment and Placement Committee (APC), together with a representative of the Division of Personnel and a representative of the Programme Division, met on 30 October 1990, to consider the applications for the post. After reviewing the qualifications of the four short-listed candidates, the Panel unanimously recommended that the candidate ranked first by the Director of the Programme Division be appointed to the post. As regards the Applicant, the SAP noted that although "she has shown a good performance; however, she does not match the academic qualifications nor the field of experience that the previous candidate has." The candidate chosen by the SAP had joined UNICEF as a Junior Professional Officer in 1988. After working on a short-term basis for the Accounts Section, she had been granted a fixed-term contract in the Programme Division, as Assistant to the Associate Director, at the P-2 level. According to the record, the recommendations by the SAP were not forwarded to the APC. On 5 November 1990, the Executive Director approved the appointment of the candidate endorsed by the SAP. On 30 November 1990, the Applicant requested the Secretary-General to review this decision.

In a reply dated 9 January 1991, the Deputy Executive Director, on behalf of the Executive Director, informed the Applicant that the decision would be maintained.

On 11 February 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 13 September 1991. Its conclusion and recommendations read as follows:

"Conclusion and Recommendations

27. The majority of the Panel concludes that the rules concerning appointments and placement had not been applied consistently in the case under consideration, which had had the effect of denying the Appellant a full review of her candidature by her peers, i.e., the Global APC.

28. Accordingly, the majority of the Panel recommends that the Appellant be given priority consideration for any appropriate core post vacancy at the P-2 level for which she is found to be qualified and in which she is interested.

29. The majority of the Panel also recommends that the Appellant receive three months pay at the P-2 level for the injury she suffered as a result of the Administration's failure to review her candidature thoroughly and equitably in accordance with existing rules."

In a dissenting opinion, the Chairman of the JAB panel stated in part:

"...

2. The Panel having rejected other claims by the Appellant, rightly focused its attention on the question whether in the selection process UNICEF had breached established procedures and policies regarding appointments, promotions and lateral transfers. In this regard the Panel had to deal with the difficult problem of separating its examination of the Appellant's grievances from any consideration which would be tantamount to questioning the manner in which another candidate arrived at the stage where she was subsequently selected for the post. The issue was whether the Respondent by-passed the Appointment and Placement Committee (APC), thus denying the Appellant due process, and not how the other candidate was selected for the post.

3. Except for the minutes of the Selection Advisory Panel (SAP) which the Panel requested and received from the Respondent, the Panel was deprived of its responsibility to independently seek and review all relevant confidential documents, including, if necessary, the employment records of all the candidates for the post. Regrettably, the Appellant had access to and provided as attachments to her statement of appeal, the Personnel Action (P.5) documents of another staff member. As noted in paragraph ... above, the Panel expressed its concern at this apparent breach of confidentiality and infringement on the rights of the selected candidate.

4. It is clear that while purporting to be concerned about the alleged by-passing of the APC, the Appellant dwelt at length on the qualifications and suitability of the selected candidate for the post in question. She stated, inter alia, that:

> '... The selected candidate's work experience with UNICEF is limited to financial accounting of programme accounts and does not include any practical experience whatsoever in programming work... The Appellant questions the criteria used in the selection in the light of consideration that the selected candidate did not even fulfil the minimum requirements. One consideration, however, appears to have been that of nationality. The selected candidate is from a major donor country of UNICEF, while I am from a developing country...'.

5. If indeed there was a breach of the selection process outlined in paragraph ... above, which in my view there was not, the Appellant should, as far as possible, have limited her arguments to the selection process and procedure without direct reference to qualifications, personnel history and nationality of any other candidate. In these circumstances, it would be injudicious for the Panel to make any recommendation in support of this appeal, let alone a recommendation for remedies, including financial on behalf of the Appellant.

6. Accordingly, I recommend that this appeal be rejected."

On 26 September 1991, the Director of the Office of the Under-Secretary-General for Administration and Management informed the Applicant that:

> "The Secretary-General has re-examined your case in the light of the Board's Report, including the minority opinion. He wishes first to note that he shares the Panel's unanimous concern at the breach of confidentiality regarding the selected candidate. With regard to your appeal, the Secretary-General has concluded that you were given full and fair consideration for the post in question in accordance with UNICEF's established procedures. Accordingly, he has decided that the contested decision be maintained. However, in view of your very good performance record, you should be given full consideration for higher level posts in UNICEF for which you are found to be qualified and in which you may express an interest."

On 31 January 1992, the Applicant filed with the Tribunal the application referred to earlier.

The Applicant separated from the service of UNICEF with effect from 30 April 1993.

Whereas the Applicant's principal contentions are:

1. The Respondent inconsistently applied the rules concerning appointments and placement, denying the Applicant due process of law.

2. The Respondent arbitrarily transferred another staff member to the post sought by the Applicant, circumventing normal procedures, and by-passing review by the APC in order to give preferential treatment to another candidate.

3. The JAB erred when it introduced the extraneous issue of confidentiality into its consideration of the appeal.

Whereas the Respondent's principal contentions are:

1. Any part of the application that relies on documents improperly obtained and disclosed, should be stricken and disregarded by the Tribunal.

2. The Applicant was properly considered for promotion and therefore her non-selection for the post does not violate her rights.

3. The Applicant has not discharged the burden of proof to establish that her non-selection for the post in question was improperly motivated.

The Tribunal, having deliberated from 14 June to 28 June 1993, now pronounces the following judgement:

I. The Applicant's complaint centers on "violations of the terms of her permanent appointment", lack of due process, and prejudice against her, for which, initially, at the time of her application, she requested payment of "damages in the amount of two years of net salary" and assignment to a "post and grade equivalent to the post of Assistant to the Associate Director of the Programme Division of UNICEF". On 10 May 1993, the Applicant informed the Tribunal that she had "resigned from the service of UNICEF effective 30 April 1993" and asked that her plea for an equivalent post and grade, be changed to read "to order the Respondent to pay the Applicant the amount of two years of net salary, for exemplary moral damages, including punitive damages".

II. The principal controversy between the parties is essentially about the procedure followed in selecting a candidate for the post of Assistant to the Associate Director at the P-2 level. The purpose of the post, as indicated in the Vacancy Bulletin issued on 4 September 1990, is:

> "To support and assist the Associate Director in co-ordinating the work of the Geographical Sections, take part in reviews of annual reports and programme submissions, the Division's workplan, and follow-up with field offices on the implementation of programme policies and procedures."

The minimum requirement for candidates is described as follows:

"- University degree or equivalent in social science or related discipline. Hands-on knowledge of computer applications required.
- At least two years of progressive and diversified knowledge of UNICEF programme policies and procedures and experience in their application.
- Fluency in English. Knowledge of French and Spanish an asset".

III. The Applicant contends that under the "guidelines" circulated by the Respondent on 2 May 1983, the "Appointment and Placement Committee (APC) will review the recommendations of the Selection Advisory Panel" (SAP) and inasmuch as this was not done, the Applicant was the victim of an improper procedure. The Respondent, on the other hand, asserts that the established procedure was correctly followed and that Personnel Administration Management Manual, Chapter 4, Section 4, paragraphs 4.4.7 and 4.4.8 provides that, "for appointments of existing staff members to vacant posts at the same level as their own personal grade, provided there is consensus in the SAP", the SAP's recommendation has to be sent to the Director of Personnel and not to the APC.

IV. The details furnished, both by the Applicant and the Respondent, in support of their positions have been considered by the Tribunal. It appears to the Tribunal that there was some confusion, resulting from the way it was described, about the status of the successful candidate. That candidate was already at the same level as the post advertised and whether or not her appointment could be considered strictly as a lateral transfer, is immaterial. The successful candidate was entitled to be considered for the post, along with sixteen other applicants, because she was a former Junior Professional Officer (JPO) serving at the time on short term fixed contracts. In section 5.3.56 of the UNICEF Personnel Administration Manual - Vol. 1, it is stated that: "JPOs, like qualified applicants from any UN member state, are eligible to

compete with internal candidates for vacant UNICEF international project or core posts, when they complete their term of duty". The fact that the successful candidate was occupying the post advertised, has little significance in the system followed by UNICEF.

V. As indicated above, different views have been taken with respect to the "guidelines" in force for filling the advertised post. The Applicant asserts that it was necessary for the SAP to send its recommendation to the APC in the first instance. On the other hand, the Respondent maintains that, since there was a consensus in the SAP, its recommendation in the present case, could be sent directly to the Director of Personnel. The Tribunal finds that the Respondent followed established practice, while bearing in mind the main consideration, that the best candidate available should be selected for any post. There was consensus in the SAP about who was the best candidate. On 9 January 1991, in explaining the position fully to the Applicant, the Deputy Director (Operations) wrote to her, inter alia, that:

> "On 30 October 1990, a Selection Advisory Panel consisting of a representative from the Office (PD[Programme Division]), from DOP and from the APC was held at which time all shortlisted candidates were reviewed. As you were one of the shortlisted candidates, the SAP carefully reviewed your candidature. The SAP unanimously agreed to the selection of another applicant as the best suited for the post.
>
> On 5 November 1990, the Deputy Director, DOP approved the appointment of this other candidate. You were subsequently advised by letter on the same day of this selection."

VI. The Applicant is entitled to evaluate her own achievement and performance in any way she wishes (in spite of nemo judex in sua

causa), but the assessment of candidates for posts is a responsibility within the lawfully exercised discretion of the Respondent. Neither the Tribunal (nor the JAB, as indicated in its report) can substitute its evaluation for that of the Respondent.

VII. The inclusion of the Applicant among the four candidates short-listed by the supervisor of the Department, shows that her candidature was weighed and assessed before it was reviewed by the SAP. This satisfies the Tribunal that the selection process was proper. The Applicant's suggestion that she has been a victim of a flawed procedure, to the extent of being excluded as a result of some arrangement made in advance, cannot be sustained.

VIII. The Tribunal, having rejected charges of wrong-doing on the part of the Respondent in applying the prescribed procedure, now turns to allegations of prejudice and discrimination the Applicant makes against the Respondent. She asserts that the General Assembly resolutions regarding the advancement of women, especially women from developing countries, were not adhered to. There is not one iota of evidence this was so. Accordingly, the Tribunal is unable to sustain these allegations.

IX. The Applicant also alleges that by not selecting her for the advertised post, the Respondent failed to "provide occupational training opportunities ... to enable women in low-ceiling occupations to choose more promising careers". This complaint is also without substance as the Administration repeatedly recognized and appreciated "years of service and your contribution to UNICEF". On 26 September 1992, the Director, Office of the Under-Secretary-General for Administration and Management, indicated - on behalf of the Secretary-General - in a letter written to the Applicant that

"in view of your very good performance record, you should be given full consideration for higher level posts in UNICEF for which you are found to be qualified and in which you may express an interest".

X. The Tribunal must record its strong disapproval of one aspect of the presentation of her case by the Applicant. The JAB has found and the Respondent has confirmed that the Applicant used documents from another staff member's personnel file, in "breach of confidentiality". In support of her action, the Applicant maintained that she was not aware of the appropriate instruction prescribing "that official files should not be removed from the personnel offices, and that only the staff members concerned and authorized officials could have access to those files". The Applicant went on to explain that she presented the confidential material as "all available evidence must be presented" to the Tribunal and that "the Administration cannot hide behind the issue of confidentiality".

The privacy of a staff member's personnel file is so self-evident as to require no further elaboration by the Tribunal. Hence, the Tribunal cannot accept these explanations for the infringement of rules of confidentiality, especially as there are provisions in the Tribunal's Statute and Rules for obtaining such material as may be needed for the proper consideration of a case. Besides, the Applicant, having served with UNICEF for about twenty years, must be presumed to have known the observance, in practice, of the confidentiality of personnel files, even if she was not aware of the precise instructions relating thereto. The Tribunal wishes to alert all applicants who may come before the Tribunal in the future, that the acquisition, use or introduction of unauthorized confidential or privileged documents will be totally inadmissible, and any attempts to do so will meet with disapproval by the Tribunal and may have adverse consequences for the Applicant.

XI. In view of the foregoing, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Vice-President

Ioan VOICU
Member

Geneva, 28 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/595
28 June 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 595

Case No. 652: SAMPAIO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Francis Spain;

Whereas, on 10 February 1992, Leonor Maria Maia Sampaio, a staff member of the United Nations, filed an application which read, in part, as follows:

"II - Pleas

...

(b) The decision which the Applicant is contesting is the denial by the Secretary-General of the reimbursement in the correct amount due to her of medical expenses covered under the Staff Mutual Insurance Society Against Sickness (hereinafter referred to as the Society), pursuant to article VI 2 of the Staff Regulations for Staff posted or serving at Geneva.

(c) The obligation which the Applicant is invoking and whose specific performance she is requesting under article ... of the Statute of the Tribunal is the obligation to reimburse the staff member in the amounts due in accordance with (b) above at a rate of exchange established on the basis of the principles laid down by the Tribunal in Judgement No. 234, Johnson vs. the Secretary-General and in compliance with UN Financial and Accounting Instruction No. 31, Rev. 1.

The method sanctioned by the Respondent in this case is, moreover, a violation of the general principle prohibiting the Secretary-General from applying discriminatory principles and practices to different staff members or groups thereof in matters of their compensation, including the reimbursement for expenses to which they are entitled.

(d) The amount of compensation sought is 9.012.00 Swiss francs, representing the difference between the amount she received as reimbursement, calculated at the rate of exchange prevailing on the date of payment and that applicable on the dates when she incurred the expenditures. This amount should be augmented by interest at the prevailing rate, during the period of delay."

Whereas the Respondent filed his answer on 4 May 1992;

Whereas the facts in the case are as follows:

The Applicant, a national of Brazil, entered the service of the United Nations in New York, on 28 January 1970, on a fixed-term appointment as an Associate Librarian at the P-2 level. The Applicant's appointment became permanent with effect from 1 April 1974. The Applicant was transferred to the United Nations Office at Geneva (UNOG) on 1 January 1972. In May 1980, the Applicant was reassigned to Headquarters. With effect from 14 January 1989, she was reassigned to UNOG. On 1 July 1990, the Applicant was transferred to UN Headquarters.

During her assignment in Geneva, the Applicant was a member of the Geneva United Nations Staff Mutual Insurance Society Against Sickness and Accident (the Society), established under staff regulation 6.2 "to reimburse, within the limits laid down in the Society's Internal Rules, the expenses incurred by its members arising from sickness, accident or maternity". During 1989, the Applicant went to Brazil on home leave and incurred certain medical expenses in respect of herself and her daughter. The Applicant filed claims with the Society for reimbursement of the medical expenses incurred. The total amount of the claim was Brazilian cruzados 35046.47. On 21 February 1990, the Society reimbursed the

Applicant, converting Brazilian cruzados into Swiss francs, using the official UN rate of exchange prevailing on that date, as provided in annex II, article 2 (a)(vii) of the Society's Statute and Internal Rules.

On 27 March 1990, the Applicant wrote to the Society, contesting this method of conversion. She claimed that failure to use the correct method, i.e. conversion at the official UN rate of exchange prevailing on the date of expenditure, had resulted in a loss to her of approximately Swiss francs 9,012. She requested that the exchange rate prevailing on the date of expenditure be applied to her claim for reimbursement.

Under the provisions of annex II, article I of the Society's Internal Rules, claims are submitted to UNOG's Finance Service for examination and payment. Accordingly, on 10 April 1990, the Officer-in-Charge of UNOG Finance Service, Payment Section, informed the Applicant that the computation had been made in accordance with annex II, article 2 (a)(vii) of the Statute and Internal Rules of the Society which provided for the application of the UN official rate of exchange on the date of reimbursement (i.e., 21 February 1990).

Further correspondence ensued between the Applicant and the Society. On 24 August 1990, the Applicant requested the Secretary-General to review the Society's decision. Not having received a substantive reply, on 16 November 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 22 May 1991. Its conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 28. In view of the Panel's unanimous finding that relevant procedures were breached in the course of reaching the contested decision, it concluded that recommendation for redress would be appropriate.
>
> 29. While noting that the appellant had requested the JAB to recommend that the rate of exchange prevailing on the date she incurred the expenses be

used in determining the amount of her reimbursement and the Respondent's contention that it was 'not for the Joint Appeals Board whose competence is limited by staff regulation 11.1 to appeals by staff members against administrative decisions alleging the non-observance of their terms of appointment to recommend that an exception be made to a valid rule' the Panel recalled that since the Society and its rules were established under staff regulation 6.2 for the benefit of United Nations staff members serving at Geneva and since it was competent to receive appeals with regard to the non-observance of the Staff Regulations and Rules and any rules made thereunder, it was equally competent not only to decide the question of the non-observance of the rules of the Society, but also in view of its finding that there had been a breach of the relevant procedure, to examine whether or not to recommend that an exception be made to the application of the relevant rule of the Society.

30. Having noted that the real reason the appellant contested the application of the relevant rule of the Society to the refund of her medical claim was that it would cause her financial loss and also having noted the Respondent's acceptance that the application of the relevant rule of the Society to individual cases results in the reimbursement of a greater or lesser amount than would be the case if the date of expenditure was used, and that using the rate of exchange prevailing on the date of expenditure would be favourable to the appellant, the Panel concluded that this was a case in which an exception should have been considered by the Society. Nothing prevented the Society from considering such an exception at any time during these activities and proceedings. The Society, however, did not do so, and persisted in not doing so, despite the appellant's numerous applications to the Society for use of a different exchange rate, her request to the Secretary-General for administrative review and her appeal to the JAB. Accordingly, in order to give equitable relief: equity assumes that which should be done, is done, the Panel itself has considered an exception to the relevant rule of the Society, and found that it would be appropriate to grant one.

31. Accordingly, the Panel <u>recommends</u> that as an exception, the appellant's refund should be calculated using the rate of exchange prevailing on the date of expenditure."

On 27 June 1991, the Officer-in-Charge of the Department of Administration and Management transmitted to the Applicant a copy of the Board's report and stated:

> "Bearing in mind the following conditions:
>
> (a) that you, as a member of the Society, had accepted its Statute;
>
> (b) that the Statute establishes Internal Rules to govern the administration of the Society and Annex II to those Internal Rules establishes the refund procedure, which incorporates an appeals procedure;
>
> (c) that you did not receive the benefit of the appeals procedure provided in the Internal Rules on the question at issue, i.e. whether an exception ought to be made to Internal Rule 2(vii) of Annex II;
>
> the Secretary-General has decided to remand this question to the Society for consideration by its Executive Committee in accordance with its Internal Rules."

On the same date, the Officer-in-Charge of the Department of Administration and Management wrote to the Executive Secretary, Executive Committee of the Society, informing him of the Secretary-General's decision on the JAB report and asking to be informed of the outcome of the Committee's consideration of whether an exception ought to be made in respect of the Applicant's claim for reimbursement.

On 2 December 1991, the Director, Office of the Under-Secretary-General for Administration and Management informed the Applicant as follows:

> "Further to [the Officer-in-Charge of the Department of Administration and Management's] letter to you of 27 June 1991, this is to advise that the Executive Committee of the Society has reviewed your case, as had been requested in the interest of good administration. It has decided to maintain its decision since no exceptions have been made in the past and exceptions would make orderly administration of the Fund difficult. Copy of the cable of

14 November 1991, from the Executive Secretary of the Society advising of this decision is attached.

At the same time, the Secretary-General has considered the Board's report and its recommendation. He has concluded that the Board had no jurisdiction to hear your appeal since the Society has a set of Statutes and Internal Rules agreed to by all the members, including an appeals procedure. Accordingly, he has decided to reject the Board's recommendation.

The exceptional delay in dealing with the recommendation of the Joint Appeals Board in this matter was caused by the need to conduct several rounds of consultation, and is regretted."

On 10 February 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent wrongfully denied her the correct amount of reimbursement in respect of her claim for medical expenses by wrongly applying the rate of exchange prevailing on the date of payment, instead of the date of expenditure.

2. The Respondent's action was discriminatory and a violation of UN Financial and Accounting Instruction No. 32, Rev.1, as well as of the Tribunal's established jurisprudence.

3. The Applicant suffered losses as a consequence of the Respondent's action.

Whereas the Respondent's principal contentions are:

1. The Applicant's medical expenses were correctly reimbursed by the Society in accordance with its Internal Rules.

2. Although the Respondent's handling of the Applicant's appeal under the Society's procedures was flawed, that flaw was rectified and the Applicant was afforded her full appeal rights.

The Tribunal, having deliberated from 4 June to 28 June 1993, now pronounces the following judgement:

I. The Applicant, while a member of the Staff Mutual Insurance Society Against Sickness (hereinafter referred to as "the Society"), during her assignment to Geneva, incurred various medical expenses during her home leave in Brazil, for which she was entitled to reimbursement by the Society.

II. According to article 2(a)(vii) of annex II of the Internal Rules of the Society, its members are entitled to reimbursement of their medical expenditures only in Swiss francs. As the expenses had been paid by the Applicant in Brazilian currency, it became necessary to convert the amount paid by the Applicant in Brazil into Swiss Francs.

The way this conversion was calculated constitutes the sole issue to be determined by the Tribunal in this case, since neither the validity of the claim for reimbursement nor its amount in Brazilian currency have been questioned.

III. The controversy arises from the fact that the Brazilian currency suffered an extremely sharp devaluation from the time when the medical expenses were paid in Brazil until the time when the Society reimbursed the Applicant. This devaluation, according to figures provided by the Applicant to the Joint Appeals Board (JAB) and not contested by the Respondent, showed that the exchange rate of the U.S. dollar in October 1989, was 4.35 cruzados per dollar when the Applicant paid her medical expenses in Brazil and it rose to 21.20 cruzados per dollar in February 1990, with a corresponding effect on the exchange rate between the Swiss Franc and the Brazilian cruzado, when the Society reimbursed the Applicant.

IV. The Society accepted the Applicant's claim for reimbursement, but calculated the conversion from Brazilian currency to Swiss Francs according to the exchange rate prevailing at the time of refund. The Applicant disagreed with the exchange rate used for the conversion and claimed that she was entitled to reimbursement

at the rate of exchange in effect on the date of payment of her medical bills in Brazil.

V. The Society refused to accept the Applicant's view on the ground that paragraph (2)(a)(vii) of annex II of its Internal Rules clearly specifies that "expenditure in foreign currency shall be refunded at the official United Nations rate of exchange in force at the date of refund".

The Applicant requested the Secretary-General to review the Society's decision and not having received a reply, filed her appeal before the JAB. The JAB found that the proper procedure had not been observed and recommended that an exception be made to the rule invoked by the Society to refuse the Applicant's request. The Secretary-General transmitted the JAB report to the Applicant and informed her that he had "decided to remand this question to the Society for consideration by its Executive Committee in accordance with its Internal Rules." The Society reconsidered its decision but refused to make an exception in favour of the Applicant.

The Respondent, on receipt of this refusal, decided to reject the JAB report on the ground that it had no jurisdiction in the case, since the Society had its own appeals procedure. At the same time, the Tribunal notes that a congratulatory letter was sent to the JAB for its work on the case. In spite of the Respondent's decision regarding the JAB's lack of competence, he did not raise this question of competence before the Tribunal.

The Tribunal, however, wishes to address the question, in order to dispel any doubt as to its own competence to decide this case.

VI. The first issue to be considered by the Tribunal is whether the existence of an appeals procedure established by the Statute and Rules of the Society precludes the possibility of the Applicant resorting to the recourse procedure against administrative decisions established by the Respondent under Chapter XI of the Staff Rules and Regulations.

In the Tribunal's view, the Society, in spite of being a sui generis organization, cannot be regarded as being independent of the United Nations, inasmuch as it has been established by the Secretary-General, in accordance with article 6.2 of the United Nations Staff Regulations. In addition, its Statute and Internal Rules are subject to the approval of United Nations officials and its head, the Executive Secretary, is appointed by the Director-General of the United Nations Office in Geneva.

VII. As a consequence, the Tribunal concludes that the United Nations Staff Rules and Regulations are applicable to the Society and that the establishment by the Society of an internal recourse procedure does not abrogate the right of any of its members to resort to the appeals procedure provided by the United Nations Staff Rules and Regulations. This is all the more so, since the internal appeals procedure of the Society only provides for review by its Executive Committee, a body entirely composed of members appointed by the Administration. To refuse members of the Society any further recourse, in particular, to refuse them the possibility of going before a body in which the staff is represented, such as the JAB and ultimately before the Administrative Tribunal, an independent judicial organ, would be tantamount to depriving the staff of essential rights.

VIII. The Tribunal will now examine the merits of the Applicant's claim. The Tribunal notes, in the first place, that, according to staff regulation 6.2, "The Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave and maternity leave, ...". It was to ensure that these rights of the staff are safeguarded that the Secretary-General established the Society. Consequently, the Society cannot, in any circumstance, adopt a decision or introduce a rule that has the effect of thwarting the fundamental purpose for which it was created. If such a decision is taken or such a rule is adopted by the Society, it infringes the staff member's rights

under staff regulation 6.2. In addition, paragraph 2(a)(vii) of annex II of the Society's Internal Rules contains an aspect of arbitrariness. By fixing the date for conversion to Swiss Francs at the date of payment by the Society, rather than a proven date of payment of the medical expenses by the staff member, the Tribunal finds, as indeed has been admitted by the Respondent, that the Society, in effect, requires the staff member to chance the fortuity of upward, downward or no movement in the exchange rate. Although the Tribunal recognizes that this may be administratively convenient for the Society, that does not justify imposing such a risk on the staff member in the context of reimbursement of expenses under a health protection system.

IX. The Tribunal holds that, because of the deficiencies noted above, the application of paragraph (2)(a)(vii) of annex II of the Society's Internal Rules in this case, has prevented the Applicant from recovering expenses incurred for health protection to which she was entitled.

X. The Tribunal considers it legitimate to conclude that the meteoric fall (between 400 and 500%) in the exchange rate of the Brazilian cruzado, (in relation to the Swiss Franc), in a very short period, could not be foreseen when the Society established its Statute and Rules. Further, the Tribunal is of the view that it was to meet these remarkably unusual developments that a request for making exceptions in the application of the relevant rule was made, irrespective of the fact that the Applicant had accepted implicitly the Society's Statute and the Rules made thereunder. However, the Society declined to make any exception, despite the recommendation of the JAB, endorsed by the Respondent, on the ground that no exception had ever been made and that exceptions could create complications in the administration of the Society's funds. Without commenting on these grounds for rejection, the Tribunal finds that as a consequence, the Applicant has been denied her rights.

XI. Thus, the Administration, as a result of decisions taken by officials of the Society - appointed by the Administration - and of the enforcement of rules approved by the Administration, failed to protect the Applicant's rights to health coverage as recognized in staff regulation 6.2. Accordingly, the Tribunal finds that the Administration should be held responsible for such failure.

XII. For the reasons set forth above, the Tribunal orders the Respondent to pay to the Applicant the amount, in Swiss Francs, that the Applicant should have received from the Society, at the rate of exchange prevailing at the time she paid her medical expenses in Brazil, less the amount she has already received from the Society, in order to cover completely the expenses she incurred. This sum should be payable with 8% interest, from February 1990, until the date of payment.

(Signatures)

Samar SEN
First Vice-President

Luis de POSADAS MONTERO
Second Vice-President

Francis SPAIN
Member

Geneva, 28 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary